CUIAB
Office of Appeals
Date

Re: Claimant/Appellant Name
Case No. _____
SSN: _____

APPEAL OF CLAIMANT [NAME]

Introduction

This brief is filed in support of the appeal of Claimant _____ from her denial of eligibility for UI benefits. Claimant was previously employed by UC_____ in the position of lecturer. Claimant's **actual** dates of employment were from [put in actual start and end dates taught for the quarter/semester/academic year – **do not state that employment dates were from, e.g., July 1, 2018 to June 30, 2019**]. As of [put in last actual ending date for class], Claimant was no longer employed by UC and therefore eligible for UI benefits.

Even though Claimant was not employed in any capacity by UC from [insert dates here from end of actual teaching assignment through duration of date on appointment letter], she was wrongfully disqualified by EDD and the ALJ on grounds that she received compensation during this period and therefore was not "unemployed." This finding is factually and legally wrong; it stems from the EDD's and ALJ's misapplication of the facts and law as set forth in the Unemployment Insurance Code.

As explained below, **NAME** was paid by UC _____ for 9 months of work, but over a period of 12 months; this is what is known as a "1/12 lecturer." This payroll system is the result of the employer's policy over which Claimant has no control, and which applies to thousands of lecturers on all UC campuses. Accordingly, during the period in question here, Claimant was unemployed and eligible for the claimed UI benefits.

Statement of Facts

INSERT FACTS AS PERTINENT TO PARTICULAR CASE:

Claimant Jane Doe was employed as a non-tenured lecturer (aka "NSF") by UC Davis for the period of September 1, 2018 until May 15, 2019. As an NSF, Claimant's employment automatically ended as of May 15th – the last day of classes for UC Davis's academic year. After that date, she performed no work at all for UC. She was, however, paid over a period of 12 months for her nine months of work, and is referred to as a 1/12 lecturer for pay purposes. This sort of arrangement is typical in public education, and is a historic anomaly. Unlike most private sector employees, a public sector employee whose assignment terminates is legally unable to demand payment of all wages earned, on the last day or employment, or as soon thereafter, as provided for in Labor Code section 201.

Claimant's appointment letter, received in evidence by the ALJ, notes the temporary, limited nature of her assignment, its automatic termination and its contingencies: "Please be advised that appointments in this title are temporary, and self-terminating. Therefore, no further

notice of non-reappointment will be sent to you, and the University is not obligated to extend or renew this appointment. The University has the right to change your teaching assignment when necessary due to enrollment, curricular, or budgetary needs." (Exhibit " ", letter dated _____ _____,)

Because the Appellant's 9-month assignment was contingent on enrollment, curricular needs and funding, she was entitled to unemployment benefits when it ended. (*Cervisi v. California Unemployment Insurance Appeals Board* (1989) 208 Cal. App.3d 635.) The application of *Cervisi* was not disputed in the ALJ's decision. Despite her rights to unemployment compensation under Cervisi, the Claimant was nonetheless disqualified because the employer spread out her payments for her work during those 9 months, over a period of 12 months, as required by the collective bargaining agreement covering her job position lecturers. As noted above, a copy of the contractual provision which requires that she be paid over 12 months, for nine months work, is Attachment A and was attested to at hearing.

Furthermore, while a 9-month adjunct lecturer receives retirement service credit for this 9 months of work, they get no additional retirement service credit as a result of being paid over the 12 month period. Attachment B is a copy of the pertinent pages of the UC Retirement System Plan Regulations (Regulations 5.04, 6.04, 7.04, 8.04, Service Credit, April 2012 ed., at p. 99, found at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CC4QFjAB&url=http%3A%2F%2Fatyourservice.ucop.edu%2Fadministrators%2Fdocs%2Fucrp-regulations-2012_final.pdf&ei=YIJyUqOKFcfW2QWKz4HIBA&usg=AFQjCNGj8iRevndQIwlfp59wokP0PGpwQQ&bvm=bv.55819444,d.b2I. A copy of these regulations appears in the record as well.

These regulations explain that service credit is based on the percentage of load, not the month or months in which one is paid:

> "Service Credit for 9-, 10-, and 11-month Appointments
> The amount of Service Credit earned under Sections 5.04(a), 6.04(A), and 7.05(a) for any month by a faculty Member with a 9-, 10-, or 11-month appointment who works full-time shall be equal to one-ninth, one-tenth, or one-elevenths, respectively of a year of Service Credit.
> * * * *
> "The amount of Service Credit earned under Sections 5.04(a), 6.04(A), and 7.05(a) for any month by a faculty Member with a 9-, 10-, or 11-month appointment who works less than full-time shall be equal to one-ninth, one-tenth, or one-elevenths, respectively of a year of Service Credit multiplied by the percentage of time worked."

(UC Retirement Plan Regulations, section 5.04 et seq., subpart I - 2012 ed., p. 99)

In other words, a 9-month lecturer such as Claimant, earns the same 1/9 service credit per

month for each one month worked, multiplied by the percentage of time worked, as earned by a 12-month lecturer. Each earns 1 year of service credit. Hence, payment of wages earned in the 9-month period, over 12 months, makes no difference to her total service credit. She received credit for a single academic year, and the payout of the rest of her 9 months earnings, after she was unemployed, got her no additional retirement service credit.

Also in the record is Article 6 of the collective bargaining agreement showing that despite her employment for 9 months, she would be paid on a 1/12 month basis. Again, this clause applies to an entire class of faculty - the non-senate faculty. (See Article 6)

The ALJ Ruling

INSERT SUMMARY OF RULING:

The ALJ ruled that Claimant was not "unemployed" during the six week period from May 15, 2019 to June 30, 2019 because she was paid by UC during this period. In doing so, the ALJ misinterpreted the crucial facts of this claim that per UC policy, the entire class of 1/12 lecturers are paid over 12 months for their actual 9 months of work.

The ALJ's decision thus erroneously relied on and misapplied UI Code §1252 which provides that an individual is unemployed in any week during which she performs no services and with respect to which no wages are payable. As further explained below, Claimant here performed no services during the 6 weeks between May 15 and June 30, 2019. Any wages Claimant received after May 15th were paid for the services she performed during the 9 month period prior to May 15th – these were previously earned wages that were deferred by the employer pursuant to its internal policies and the MOU between the employer and UC-AFT, the exclusive bargaining representative, that governs the class of 1/12 lecturers.

Argument

Claimant's Right to UI Benefits under *Cervisi*

The decision in *Cervisi v. California Unemployment Insurance Appeals Board* (1989) 208 Cal. App.3d 635, holds that every assignment of a faculty member which is contingent upon enrollment, funding, employer needs or "bumping" by another lecturer or even a tenured teacher, does not amount to "reasonable assurance" within the meaning of UI Code §1253.3.

Cervisi, in overruling the Department and sustaining the trial judge, held that *as a matter of law* claimants did not have a "reasonable assurance of reemployment" as defined in section 1253.3. *Id*. at 637, 639. As the court explained:

> "Under the statute, an assignment that is contingent on enrollment, funding, or program changes is not a 'reasonable assurance' of employment. (§ 1253.3)(g).)"

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Claimant's appointment letter dated DATE, provides that her assignment self-terminated on DATE and contains the contingency that "the University is not obligated to extend or renew the appointment. **The University has the right to change your teaching assignment when necessary due to enrollment, curricular or budgetary needs."** (Ex.)

Because Claimant's 2019-2020 and future assignments are contingent upon enrollment, funding, employer needs and bumping by another lecturer or faculty member, UC legally cannot provide reasonable assurance of employment, regardless of Claimant's history of employment with UC.

Claimant is not Disqualified from UI Benefits as She was Unemployed During the Period of May 15, 2019 through June 30, 2019.

Under UI Code §1252: "an individual is unemployed: (1) in any week during which the individual performs no services and with respect to which no wages are payable." In Claimant's case, she was unemployed for the subject period because she performed no services for UC on any day or in any week after May 15, 2019. Likewise, no wages were payable to her for any week after May 15th. Any money paid to her by UC after that date was in the form of deferred compensation for the time she worked prior to then. Section 1252 was not intended to, nor does it, apply to the situation presented by 1/12 lecturers who are not given any choice but to paid over 12 months for 9 months of actual work.

Although eschewing the terminology, EDD and the ALJ appear to have erroneously treated the Appellant's receipt of pay over a 12-month period for 9 months work as a "salary continuation," analogizing it to an *individual* discharged employee who negotiates or receives additional pay for a period following dismissal. The analogy is fallacious.

Paying an employee for 9 months work over 12 months, pursuant to a collective bargaining agreement or employer plan, does not constitute "continuation pay." Nor was the wage payment "payable" for any particular week following May 15, 2019, her termination date. Rather, the deferred compensation was due because it was earned between September 1, 2018 and May 15, 2019, and payment was delayed for wages earned in this period under the employer's policy as memorialized in the contract applicable to the class of 1/12 lecturers.

Claimant's status as a previously employed 1/12 **lecturer** does not disqualify Claimant because this salary is for work performed during Claimant's previous **9 months of employment**. It is paid pursuant to a **group-based employer payroll plan, to a large class of similarly situated lecturers**. These lecturers do not have any input on what payment plan they are placed on. UC solely makes this decision, "NSF appointed for the entire academic year will be paid on a 1/12 basis" (UC Contract Administration Manual, Article 6: Academic Year-Appointment; Ex.).

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Plaintiff's pay for her academic work during the school year, deferred until the end of the academic year pursuant to the Employer's 1/12 pay plan, therefore does not constitute wages within the meaning of section 926 *et seq*. of the Unemployment Insurance Code. The Employer and/or EDD is claiming that these wage payments should disqualify the Claimant, despite indisputable evidence that Claimant was not actually employed by the Employer during the weeks in question. **The Claimant was in a non-employment status during this time period - that is an "involuntary separation from employment" resulting from the self-terminating nature of her temporary appointment**.

The law under the UI Code is clear that where post-discharge payments to a terminated employee are the result of a **"plan" or a negotiated collective bargaining agreement**, which **applies to a class or group of employees**, they are **not considered wages under the Code**, and the **employee is not considered employed on the date such payments are received**. This position was affirmed in *Citroen Cars Corp. v. CUIAB* (1980) 107 Cal.App. 3d 945, which held that in circumstances analogous to those present here, postemployment payments simply supplemented" unemployment benefits. The case of 1/12 lecturers is similar to *Citroen* in that lecturers are the recipient of **previously earned pay** on a deferred basis; the right to that pay is **not based on services performed during the post-discharge period**.[1] The employer cannot be allowed to disqualify these employees from receiving UI benefits by unilaterally delaying payment of earned compensation until after their termination. By doing so, these employees are irrationally treated differently and denied benefits than those employees who may also be employed for 9 months but receive their entire pay over the nine month period.[2]

The terms "services" and "wages" appearing in section 1252, that one is unemployed in "any week during which ... she performs no services and with respect to which no wages are payable," *plainly must be read in conjunction with each other.* They mean that one is unemployed during any week in which one does not perform services and "no wages are payable at once." This is the only logical interpretation.

As the courts long ago observed in construing section 1252, the "*Legislature did not intend that the payment or withholding of benefits should turn on nice distinctions in the definitions of words like 'employed*.'" *Carlsen v. Unemployment Insurance Appeals Board* (1976) 64 Cal. App. 3d 577, 585. The same standard applies to "payable." In *Carlsen*, a titular

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[1] *Citroen*, of course, addressed whether *severance pay* received post-employment constituted wages within the meaning of UI Code section 1265. Because they were held to be paid under a plan supplementing unemployment compensation, they were construed as not being wages for purpose of receiving UI benefits. In Claimant's situation no severance pay is involved. However, her post-discharge wages resulted from an employer plan which pays previously earned wages on a 12-month basis for 1/12 lecturers working nine months, hence she did not receive wages payable for work performed after her assignment ended.

[2] 1/12 lecturers who work for 9 months but are paid over 12 months do not earn any more than similarly-situated lecturers who work for 9 months and receive their entire wages in the 9 month period, "1/9" lecturers. (See Article 6 of the MOU.)

but *unpaid* president/carpenter of a small, self-owned company, filed for unemployment benefits after unsuccessfully seeking construction work. The CUIAB denied benefits on the grounds he was still the company president, albeit one not presently working and earning any pay. The case turned on the application of the terms employed and payable, under 1252.

In addressing the word "payable," the *Carlsen* court observed that *payable* within the meaning of section 1252 did not mean "capable of being paid." *Id*. at 586. Instead, the court recognized that application of section 1252 and its terminology had to be viewed through the lens of the beneficent purpose of the legislation which conceived it:

> "In view of the liberal construction which must be accorded to a remedial statute such as the Unemployment Insurance Act, we are satisfied that the Legislature intended the phrase 'wages are payable' to denote a situation where an employer was under an unequivocal and present obligation to pay wages to his employee pursuant to the contract of hire, hence wages which are 'payable at once'..." *Id*. at 587.

Because there was no obligation by the company to pay Carlson for his continuing services as president, no wages were payable within the meaning of section 1252, and no wages were "payable at once." *Id*. Therefore, the court held that claimant was eligible for receipt of UI benefits.

Here, the Claimant was not entitled to any wages in any given week after her job ended. She did not earn any wages during the weeks after her contract ended on May 15, 2019. She performed no services for UC immediately after May 15th. Rather, she was entitled to be paid on the employer-scheduled pay day, for work performed before she was unemployed. The pay she got was earned during her 9-month teaching stint, and was not for anything "extra" or "above" her regular 9-month salary.

There is one more instructive and analogous situation which bears consideration concerning the public policy aspect of not considering deferred wages, paid pursuant to an employer plan, as compensation for unemployment purposes. Here, Claimant's receipt of this deferred compensation - **wages earned for prior service and paid after the assignment ended** - is analogous to the *Board's treatment of vacation pay* which is paid out as deferred compensation, after an employee has been discharged. In that situation, the Board does not consider the pay to be wages for unemployment purposes.

While the vacation pay situation is governed now by UI Code section 1265.5, previously it was governed by established practice. As Judge O'Brien explains in his treatise discussing vacation pay:

"**Prior to March 4, 1972, it was well established in California that an individual who received vacation pay at the time of a termination of employment was not unemployed for**

the period covered by such pay. Subsequent thereto, the Legislature passed a statute [UI Code §1265.5] which provided that receipt of vacation pay which was earned but not paid for services performed prior to termination of employment should not be construed to be wages for unemployment insurance purposes." (See O'Brien, on line version, at http://www.judgeobrien.com/ui/; emphasis added.)

In view of the foregoing and in particular the purpose of the unemployment statutes, common sense, and the statute's construction, an employee such as claimant, paid over 12 months for 9 months worked, *is just as unemployed as a 9 month lecturer or other University employee paid over 9 months rather than 12*. Given that the instant situation results from an employer policy applicable to an entire class of 9-month employees, the Claimant was unquestionably unemployed following the end of her classroom assignment. Consequently, the employer cannot use a rule intended for its convenience, to impute to her earnings for work performed before she was laid off. Otherwise, employers could always defeat the benefits and purpose of the unemployment system simply by adopting policies to defer employee compensation as UC has done here.

Conclusion

The payroll method elected by the Employer to compensate employees for 9 months work, by paying them over a 12 month period, cannot disqualify employees such as Claimant for their unemployed period following their termination. Any compulsory or class-based deferral of wages earned would thereby deny employees their rights under the Unemployment Insurance Code and the system of unemployment compensation employed by the State.

In California academic public employment, it is common in many colleges, universities, and K-12 school systems, that teachers are paid over 12 months for 9 months of work. When, as here, a teacher is employed on a temporary contract with a termination date, delayed receipt of wages does not deny unemployment benefits. Generally, these payment methods work to the advantage of public employers - they are easier and cheaper to administer, and provide a public employer with a more easily managed payroll.

The facts, UIAB law and common sense prove that Claimant was *unemployed* following May 15, 2019 within the meaning of the Code:

1. As provided for in her contract, her UC job had terminated automatically on May 15, 2019. She was not employed by UC immediately afterward, and had no reasonable assurance of re-employment within the meaning of UI Code section 1253.3;

2. When the University then deferred payment of wages earned by Claimant during her prior 9 months of work, and spread that payment out over 12 months, *the Claimant was still unemployed during the period in question* and that payment is not wages for purposes of the UI Code. This is not a "salary continuation" as that term is construed under the UI Code - Claimant

was paid deferred compensation for her salary earned during her 9-month contract, under a contractual provision involving an entire class of non-senate faculty. Hence, she qualified for benefits following the end of her assignment on May 15, 2019.

Any other conclusion would amount to subterfuge by the employer to deprive an employee whose job had ended, of UI benefits simply because the employer elected to defer payment of some of those previously earned wages for its convenience. Therefore, the ruling of the ALJ should be reversed and the Claimant found eligible for benefits, and the order requiring repayment must be reversed.

Respectfully submitted,

Signature

NAME TYPED